In the Supreme Court of the United States.

OCTOBER TERM, 1898.

NORTHERN PACIFIC RAILROAD COMPANY, AND THE NORTHERN PACIFIC RAILWAY COMPANY, *Plaintiffs in Error,* VS SERETTE O. FREEMAN, IN HER OWN RIGHT, AND AS GUARDIAN OF SARAH FREEMAN, A MINOR, AND LENNIE FREEMAN, A MINOR BY HER GUARDIAN *ad litem*, C. E. GRIFFIN, *Defendants in Error.*	No. 241.

In error to the United States Circuit Court of Appeals for the Ninth Circuit.

STATEMENT.

Defendants in Error adopt the Statement of the Plaintiffs in Error in their Brief in this cause, except that part of the Statement containing the following words: "But the evidence was not in conflict as respects the negligence of the deceased. That question as we shall show is one of law and has been brought to this court by proper exceptions. It constitutes the first and leading question to be considered."

We claim the evidence is in conflict on this question. And except the further Statement, "But forty feet before reaching the track the highway emerged from the cut and a view of the track for three hundred feet and more was wholly unobstructed."

We claim that the evidence of the only witness who testified as to the condition of the ground at the time of the collision shows that the deceased did not have an unobstructed view for this distance (see testimony of Baldwin, Record pp 54-55) until within twenty-five feet of the near rail of the track, while the horses heads would necessarily be ten or twelve feet nearer the track than the deceased, and that he did not have an unobstructed view for any considerable distance down the track until he was within about thirty feet of the near rail and his horses heads consequently not over eighteen or twenty feet from the some; and that the conditions had been considerably changed with reference to the obstructions to view between the time of the accident and the time about which the witnesses generally testified as to the views, etc.

ARGUMENT.

The only questions presented by the Plaintiffs in Error for consideration by this court, are:

First: As to whether or not there was any conflict in the evidence as to contributory negligence by the deceased;

Second: As to whether or not the court erred in granting the instruction on the measure of damages,

on account of the following expression therein, "and the loss to the wife and children caused by being deprived of the use and comforts of his society."

POINT I.

Under this head in brief of plaintifis in error, it is claimed that the Court should have instructed the jury to find for the defendant; because the evidence was not in conflict as respects the negligence of deceased.

In making their argument on this point, they appear to us to take into account only a portion of the testimony. The preponderance of the evidence, we believe, shows that the deceased had full control of the team he was driving; was paying attention; slowed up his team at the top of the hill and went down the hill no faster than one would walk; that in going down the hill his horses were in such gait as horses naturally are in a walk down a hiil with the wagon pushing on them; that he was driving slowly; that at the very first opportunity he saw the train and recognized his danger; that the horses then became frightened and dashed across the track. We believe the testimony showed all this clearly, and certainly there was more than sufficient evidence for the Court to let the case go to the jury. There was certainly more than a scyntilla of evidence against negligence on part of deceased. See

Chesapeake & O. R'y Co. vs. Steele, 84 Fed. 93, (c c a).
R'y Co. vs. Lowery, 20 (c c a), 596.
Ins. Co. vs. Randolph, 24 (c c a), 305.
R'y Co. vs. Slattery, 3 app., cases 1155.

In the case of Indianapolis, etc., R. R. Co. vs. Horst, 93 U. S. 298, the superior court lays down the rule that contributory negligence cannot avail the defendant unless shown by preponderence of the evidence.

R. R. Co. vs. Gladman, 15 Wall. 401.
Hough vs. R'y Co, 100 U. S. 213.
Coasting Co. vs. Tolson, 139 U. S. 551.
R. R. Co. vs. Volk, 151 U. S. 73.
R. R. Co. vs. Gentry, 163 U. S. 353.

The case of Continental Imp. Co. vs. Stead, 95 U. S. 161, was one where the party injured did not look in the direction from which the train was coming with which he collided; his wagon was making considerable noise upon the frozen ground so he could not hear well; the train was a special one and the defendant supposed the regular trains would be coming from the other direction and hence kept his lookout in that direction alone. The appellate court sustained the refusal of the trial court to charge that defendant could not recover, and says: "On the other hand those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greater incentive to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed without evidence, that they do not exercise proper care in a particular case." And again: "Both parties are charged with the mutual duty of keeping a careful lookout for danger; and the degree of diligence to be exercised on either side is such as a prudent man would

exercise under the circumstances of the case in endeavoring to fairly perform this duty."

The same doctrine of the question of negligence being one for the jury is set forth in the case of Railroad Co. vs. Pollard, 22 Wall 341.

In the case of Railroad Co. vs. McDade, 135 U. S. 571, the Court says: "As a general rule the question of contributory negligence is one for the jury, under proper instructions from the Court especially when the facts are in dispute, and the evidence in relation to them is that from which fair minded men may draw different inferences." See Texas & P. Ry. Co. vs. Cody, 166 U. S. 606.

In the case of Inland & Seaboard Coasting Co. vs. Tolson, 139 U. S. 551 the Court holds that contributory negligence of the party injured would not prevent him from recovering if the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence. The same doctrine is maintained in Railroad vs. McDade, 135 U. S. 554. See also Wharton on Negligence, sec. 338, and Railroad Co. vs. Ives, 144 U. S. 429 and cases cited. The evidence in this case is such that according to the statements of the engineer and fireman they should have seen the deceased in time to have avoided the collision. It was proper for the jury to say whether they did see or could have seen him and whether they could have avoided the collision.

In the case of Railroad Co. vs. Converse, 139 U. S. 469, the facts show that the party injured was struck

by a section of a freight train making a flying switch. He saw the approaching train as he approached the crossing in a covered buggy with the top up. When the engine and part of the cars passed, he drove upon the track and was struck and injured by the following section of the train; and the Court held that the question of the contributory negligence of the plaintiff was for the jury and not for the Court.

The case of Railroad Co. vs. Ives, 144 U. S. 408, was one in which the facts were equally as strong in favor of the plaintiff in error as in this, but the Court held it to be a proper case for the jury to determine the question of contributory negligence. In response to an argumsnt in this case on the part of the railroad that the question of contributory negligence shoulp have been decided by the Court, Justice Lamar says: "As the question of negligence on the part of the defendant was one of fact for the jury to determine, under all the circumstances of the case, and under proper instructions from the Court, so also the question of whether there was negligence in the deceased which was the proximate cause of the injury, was likewise a question of fact for the jury to determine under like rules. The determination of what was such contributory negligence on the part of the deceased as would defeat this action, or, perhaps, more accurately speaking, the question of whether the deceased, at the time of the fatal accident, was, under all the circumstances of the case, in the exercise of such due care and diligence as would be expected of a reasonably prudent and careful person, under similar circumstances, was

no more a question of law for the Court than was the question of negligence on the part of the defendants. There is ne more of an absolute standard of ordinary care and diligence in the one instance than in the other." This is the leading U. S. case upon this question and was followed in the following cases:

Railway Co. vs. Farra, 66 Fed. Rep. 496.

C. & N. W. Ry. Co. vs. Netolicky, 67 Fed. Rep. 665,

Lynch vs. N. P. R'y. Co., 69 Fed. Rep. 86.

Railway Co. vs. Spradling, 72 Fed. Rep. 152.

Northern Cent. R'y vs. Herdriskel, 74 Fed. Rep. 460

Cobleigh vs. Grand Trunk R'y, 75 Fed. Rep. 247.

St. Louis & S. F. vs. Barker, 77 Fed. Rep. 810.

Baltimore & O.R. Co. vs. Griffith, 159 U S. 603.

In the case of Lynch vs N. P. R'y Co., supra, the court says: "Every interence favorable to the plaintiff that can fairly be drawn from the testimony must be conceded to him in deciding the question presented in this case;" and again: "The question presedted in this case is whether the plaintiff looked and listened within a reasonable distance from the crossing. What then is such reasonable distance. Manifestly this is to be inferred AS A FACT from the circumstances of the case. It is not a matter of legal judgment, but one of general observation and practical experience It may be said, without doubt, that it would have been more prudent in the plaintiff to have

looked when he was much further from the crossing than he was at the time he did look, but it is not a question of great or relative care. It is a question of reasonable care." This is the view entertained by all the Federal courts and very generally by the state courts.

Wood on Railroads, p. p. 1522, 1530, 1548.
Mossler vs. C. B. & O. R'y, 73 Ia. 268.
Plummer vs. Eastern R'y, 73 Me. 589.
Linderman vs. N. Y. Cent. R. Co., 42 Hun. 306.
Railroad vs. Crawford, 44 Ohio St. 631.
Egan vs. Fitchburg R. R. Co., 101 Mass. 315.
Railroad vs. Hall, 61 Pa. St 361.
Elert vs. Railroad, 48 Wis. 606.

As to the amount of diligence to be exercised by a party approaching a railroad crossing, see

Sherman and Redfield on Negligence, Sec. 478.
McKay vs. Railroad, 35 N. Y. 75.
Railroad vs. Lee, 87 Ill. 454.
Loucks vs. Railroad, 31 Minn. 526.
Schnurr vs. Penn. R'y. Co., 107 Pa. St. 8.
Strong vs. Railroad, 61 Cal. 326.
Railroad vs. Crawford, 24 Ohio St. 631.

It was a physical impossibility for Mrs. Kennedy and Mrs. McDowell to tell whether the deceased was listening for the train or not. They were a consider-

able distance from him and could not tell from the position of his body that he was not looking for a train. He could have seen down the track at the earliest possible moment without turning his body. They were not close enough to see the direction in which his eyes were turned; and it was impossible for them to tell whether he was looking and listening or not even under favorable circumstances, and their evidence develops the fact that they were so excited that they didn't even see the team leave the beaten path on the road and dash around to the left. This point is fixed not only by the evidence of the little Wakefield girl, one of the witnesses for plaintiffs in error, but by other witnesses by the course of the wagon tracks. That deceased could have seen down the track without turning his body will readily be seen by looking at the diagram and photographs in the record.

In the absence of positive evidence to the contrary, it will be presumed that deceased did all that a prudent man would have done under like circumstances

Texas & P. R'y. Co. vs. Gentry, 16 Sp. Ct. Rep. 1104.

Schnurr vs. Penn. R. R. Co., 107 Pa. St. 8.

Railroad Co. vs. Crawford, 24 Ohio St. 636.

Continental Imp. Co. vs. Stead, 95 U. S. 161.

There were but three eye-witnesses who testify in this case and one of these, Mabel Wakefield, contradicts fairly the other two as to what happened there. (See Record, pages 82 to 88 inclusive.) She says that the team first stopped and pulled back. That deceased

then tried to turn them to the side, and that they then tried to get away, and ran across the track. The evidence of the witnesses for defendant in error supports her evidence except as to the distance of the horses from the track when they turned out; but it should be taken into consideration that she was behind deceased and upon the top of the hill, not in a position to judge accurately of the distance on account of the angles. Witness Baldwin at Page 45 of the record says the wagon left the main beaten track of the road at a distance of about twenty feet from the railroad. And the fact that the wagon crossed the railroad with a space of about six feet between it and the crossing as testified by Baldwin on Page 50 of record shows that he was probably right as to the distance back at which they turned out. All of this evidence shows that the deceased probably saw the train at about the earliest moment at which he could have seen it; and the team took fright at their proximity to the approaching train and became unmanageable. The evidence of Mabel Wakefield on Page 82 of the record shows that deceased was not negligent but was trying to save himself and team, and that instead of being listless and inert, he tried to get out of the way.

The condition of the wagon road made it unnecessary for deceased to stop under ordinary circumstances. The road bed was covered with sand and the wagon was a new one and made little if any noise. Witness Kocher testifies as to the wagon making no noise, at page 63 of the record; Mrs. Freeman at page 72 testifies as to the wagon being new, and Springer at page

75 fixes the character of the road bed. In view of these facts and the fact that a train could usually be heard there as testified to by most of the witnesses for defendants in error, show that it was not ordinarily necessary for one to stop to listen in approaching this crossing in order to hear a train coming from the direction in which this one was coming.

In their argument and cases cited in their brief, plaintiffs in error seem to go on the theory that the undisputed testimony shows that deceased did not look, stop or listen, and did not see the train. In all of this they are mistaken. There was strong proof that he did listen and that he saw the train at the earliest moment. In the first place the presumption is that he saw the train as soon as possible; that he used due care; in the second place there is only the testimony of Mrs. McDowel and Mrs. Kennedy which tended to show that he did not look and listen, and we submit that under the facts in this case their testimony on this point can be of but little value for reasons hereinbefore given: the testimony of the little girl—Wakefield—and of the several witnesses who showed beyond dispute that at about the first place decedent could have seen the train, the wagon left the main beaten track and crossed the railroad track several feet out of the way. Certainly, to say the least of it, this testimony was sufficient to justify the court in submitting the question to the jury. To have taken the case from the jury would have been for the court to decide as a matter of law that deceased did not see the train; that he did not try to turn the horses away from the track. The fact

alone, that the horses were turned off the road, at about the first opportunity to see the train, is sufficient to show, it seems to us, almost conclusively that deceased was looking and listening, and saw the train and attempted to avoid the danger. It will be observed that many of the cases cited by plaintiffs in error, come out of those courts where it is held that, where a person is injured, the presumption of law is that he was negligent and such presumption must be denied in the pleadings and overcome in the proof. But in this court no such presumption prevails.

As to wagon leaving traveled portion of road, see Record pages 46, 47, 48. See also pages 82 and 83.

As to the manner deceased's team approached the hill and descended it, see Record; defendant's witnesses, pages 84, 85, 76, 87. See also pages 61 to 64.

It may have been that the topography or lay of the land, with reference to him and others situated as he was, rendered the accoustics such that he could not hear the noise of the train; or the direction of the breeze or condition of the atmosphere was such as to turn the sound aside as suggested on page 66 of the Record by Witness Watson. Something of this nature must bave been the case as neither Witness Kocher nor Mabel Wakefield heard the train until it came out of the cut. See Record pp. 63 and 84. This was his misfortune and not his fault.

Plaintiff in error bases his estimate as to the distance the train was away when Freeman could have seen it upon the supposition that the team continued to

travel at a given rate per hour; while the probability is that when they became frightened they dashed across at a much more rapid rate. For this reason it is impossible to tell how sudden the collision was.

POINT II.

The second ground relied on for reversal is the giving by the Court of an instruction with relation to the measure of damage, found on pages 127 and 128 of record. Particular objection is made to that portion of the instruction reading as follows: "and the loss to the wife and children because of being deprived of the use and comforts of his society * *."

We think in reading the whole instruction on this question, it will clearly appear that it was not the intention of the Court that the jury might consider "loss of society" in a sentimental sense, or as causing injury to the feelings of the plaintiffs, but merely from a pecuniary standpoint. The jury are instructed that they should take into consideration deceased's probable duration of life; his mental and physical condition; his ability to earn money and to support and maintain the wife and children; his ability to care for and protect them and educate and train the latter. Immediately following the clause objected to and forming a part of that clause, the jury are instructed that they may take into consideration the loss of dscedent's experience, his knowledge and judgment in managing his and their affairs; that under proper facts the plaintiffs would be entitled to compensation "so far as it is susceptible of an estimate in money," and in an instruction following,

used the language: "The rule, gentlemen, is compensation," and generally the instructions impress on the jury the idea of compensation in dollars and cents.

There is nothing in this instruction, taken as a whole, which allows a jury to return any compensation for injured feelings or for grief. Most of the courts have held that instructions allowing the jury to consider wounded feelings, are error.

The Circuit Court of Appeals in this case say in the opinion in referring to this portion of the instruction: "The portion of the charge which is complained of is here so connected with the remainder of the instruction as to make it sufficiently clear to the jury that the loss of the use and comforts of the decedent's society which they were allowed to consider was the material use and comfort which were akin to other elements of damage contained in the charge, and which it is admitted that the law sanctions, the loss of experience, knowledge, judgment, etc.," which seems to us to be the correct view.

Some of the courts have held that the jury is not entitled to consider "the loss of companionship" of the husband or father; but that is where the instruction was so given as that it allowed the jury to consider the loss of companionship from a sentimental standpoint, and not from a pecuniary standpoint.

But the instruction complained of is "the loss to the wife and children because of being deprived" not of the companionship or society, but "of the use and comforts of his society, the loss of his experience,

knowledge and judgment in managing his and their affairs."

It is therefore, not the sentimental loss of the society of the husband that the jury are instructed to consider, but the "use and comforts of his society," the benefits which his presence would be to them.

Upon examination of the authorities cited by plaintiffs in error on this question as far as accessible, we observe that the objectionable instruction is simply as to the "loss of the society and companionship." They hold that such instructions are error because they do not confine the jury to a pecuniary damage. But where the instruction is so framed as that only the pecuniary loss is to be considered resulting from the loss of companionship, we believe the objectionable qualities are removed. To say that the jury may consider the "loss of the use and comforts of society," "in so far as it can be estimated in money" is simply to say that it may consider the pecuniary loss. "Use and comforts of society" means the use and comforts derived from his services, his being with them and advising and assisting them in the conduct of their affairs. Certainly the plaintiffs are entitled to recover for the pecuniary loss resulting to them because of being deprived of his presence with them. The benefits pecuniarily to be derived by a wife and children from the use of the society of a kind and competent husband and father, would be great and form one of the chief elements of the advantages and beneffts of such a protector.

In the case of Penna. R. Co. vs. Goodman, 62 Pa. St. 329, the court instructed the jury as follows: "That

damages should be given as a pecuniary compensation, the jury measuring the plaintiff's loss by a just estimate of the services and companionship of the wife of which he was deprived by the accident; nothing is allowable for suffering," etc., "But if damages are to be given at all — — they should be a just compensation for the value of the companionship and services lost to him by reason of this unfortunate collision."

Upon this the court say: "Looking at the entire charge on the subject of damages we think it clearly confined to damages—to a pecuniary compensation. — — — Companionship was used to express the relation of the deceased in the character of the services she performed. He merely meant to say that the loss should be measured by the value of her services as a wife or companion. Certainly the service of a wife is pecuniarily more valuable than that of a mere hireling — —." See also

Louisville-Nashville R. R. Co. vs. McElwain, 34 L. R. A. (Ky.) 788.

In Grolenkemper, et al., vs. Harris, 25 Ohio St. 512, the court say: "The rule furnished by the statute is that the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to the next of kin of the deceased person. It is evident that this contemplates the allowance of damages other than such as would immediately and directly follow from the wrongful act of the defendant."

In the case of Cregin vs. Brooklyn etc., R. R. 19 Hun, 343, the court sustained the following instruction: The jury should confine themselves "to what the husband suffered in respect to nursing, attendance, doctor's bills, the deprivation of ordinary affairs, of regular attendance, services, comforts of his wife's society." The last few words were objected to. The court say: "The plaintiffs are already entitled to damages for actual loss of services occasioned by the injury. Why not the loss occasioned between the personal service of a stranger and a wife, which is what I understand by the word "comforts," in the charge? It is not the value of a hired nurse, but the loss to the husband of the services and the comforts derived therefrom of his wife. How can one be separated from the other in assessing damages to a husband for the loss of his wife's services?"

See same case in 75 N. Y. Repts, 187.

In Ainley vs. Railroad, 47 Hun., 206, the court say, "the rule is that if the husband is entitled to the assistance and society of his wife, he is entitled to recover damages against a party who unjustly deprives him of such assistance and society, and there does not seem to be any reason, if the fact exists that he was deprived of such assistance and society by the act of another, why he should not recover."

Blair vs. C. & A. Ry. Co., 89 Mo., 335.
McKinney vs. Stage Co., 4 Iowa, 420.
Cooley on Torts, 226.
Furnish vs. Railroad, etc., 102 Mo., 669.

Plaintiff in error in its brief states that formerly California courts held that general loss of companionship could be taken into consideration in estimating the damages, but that the recent decisions of that state have withdrawn from the position formerly taken. In this counsel is mistaken. The California decisions, including those cited by appellant in its brief hold as they have always held, the the "loss of society and companionship," from a pecuniary view, might be considered by the jury in estimating the damage. The first case in California on this subject seems to be Beeson vs. Green Mountain Co. etc., 57 Cal. 20, as part of the instruction in that case was as follows: "and the injury, if any, sustained by her (the wife) in the loss of his (her husband) society." This instruction the supreme court upheld as proper. The court say: "We think that the social and domestic relation of the parties, their kindly demeanor towards each other, the society, were parts of all the circumstances of the case, for the jury to take into consideration in estimating what damages would be just." The ruling is based upon the assumption that in these regards there may be a pecuniary damage. And so the California decisions have held to this day, all distinctly following Beeson vs. Greene Mountain, etc., Co., supra in the cases cited by plaintiff in error from California, the court still adheres to this doctrine.

In the case of Pepper vs. Southern Pac. Co., 105 Cal., 402, cited by plaintiff in error, the court held the following instruction to be error: "The measure of damages is not alone the pecuniary loss and injury

sustained by the plaintiff in the loss of his son, as just explained, but in assessing the damages, you may, in addition, take into consideration the loss, if any, sustained by the plaintiff in being deprived of the comfort, society and protection of the deceased." The court held this error because "the loss is not restricted to the pecuniary loss."

All of the California decisions allow the jury to consider the loss of society and companionship from a pecuniary standpoint.

Pepper vs. Southern Pacific R. R. Co. 38 Pac. Rep. 974,

Monro vs. Coast Dredging Co. 24 Pac. Rep. 303,

Redfield et al vs. Oakland Consolidated Street R'y Co. 42 Pac. Rep. 822.

In the case of Hye vs. Union Pac. R'y Co. 26 Pac. Rep. (Utah) 979, the court held the following instruction to be good. In determining the question of damages, "you may also take into account the loss of society and the comfort that the parents might take with this child in rearing it and bringing it up * *" The Court say: "To say to the jury that they might consider 'the comfort that the parents might take with this child in rearing it and bringing it up,' is but slightly if any different from saying to them that they might take into account the loss to the parents of the child."

Webb vs. Denver & R. G. R'y 7 Utah 17

We have seen no case where the instruction on this question is like the one given in this case. Always they refer to the "loss of society or loss of companionship." But here it is "loss of the use and comforts of society." It has almost always been held that a child can recover for the loss of training, education and protection of the parent killed. Where, in reason, can be drawn a line between this and "use and comforts of society." The latter expression can only mean the benefits, and material domestic advantages, the social advantages, to be derived by the dependent wife and children. Who will advance the argument that there is not more advantages to be gained by the wife and children from the use of the society of a good husband—advantages such as training, education, protection—than they would derive from a stranger? The pecuniary benefit so to be derived merely by being led into better society would be great. To say that the plaintiffs cannot have compensation for the loss of the use and comforts of the society of deceased, is to argue that his society was of no more value to them than that of a neighbor. So we insist that while "loss of companionship" might be sentimental, the loss of "the use and comforts of society" are surely pecuniary in nature.

The verdict of the jury shows that it did not consider any thing other than the money loss. The deceased was an able-bodied man about thirty-two years old. Under the testimony he would probably have lived some thirty years longer if he had not met with this accident. If he were capable of earning but a dollar a

day, the jury might well have brought in the verdict it did. The verdict is very reasonable in amount. The jury could not have been led into considering any thing other than a purely money compensation.

We think the instruction was proper, and the decision of the lower court should be affirmed.

Respectfully submitted,

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